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JOSEPH F. SPANIOLO, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HELEN GJESSING, Individually and as President of Save
Long Bay Coalition, Inc., LEONARD REED, Individually
and as President of Virgin Islands Conservation So-
ciety, Inc., KATE STULL, Individually and as President
of League of Women Voters of V.I., Inc., LUCIEN
MOOLENAAR, Individually and as President of Virgin
Islands 2000, Inc., RUTH MOOLENAAR, Individually and
as Director of St. Thomas Historical Trust, Inc.,

Appellants,

and LEGISLATURE OF THE VIRGIN ISLANDS,

Appellant,

v.

WEST INDIAN COMPANY, LTD.,

Appellee.

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

On Appeal from the United States
Court of Appeals for the Third Circuit

**JURISDICTIONAL STATEMENT OF
APPELLANTS HELEN GJESSING, ET AL.**

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QUESTIONS PRESENTED

1. Did the Repeal Act unconstitutionally impair the Settlement Agreements entered into between the Government of the Virgin Islands and WICO if the Settlement Agreement(s) were invalid?

A. Are the Settlement Agreement(s), conveying trust lands contrary to the Public Trust Doctrine, valid and enforceable?

B. Are the Settlement Agreement(s), divesting the Government of the Virgin Islands of its inherent police powers, valid and enforceable?

C. Are the Settlement Agreement(s), modifying an international treaty entered into by the United States, valid and enforceable?

D. Are the Settlement Agreements, conveying property rights in violation of the common law rule against perpetuities, valid and enforceable?

PARTIES TO THE PROCEEDINGS

The parties to this appeal are listed on the title page in their entirety. Helen Gjessing, *et al.*, and the Legislature of the Virgin Islands are submitting separate jurisdictional statements to better reflect the interests and issues most important to the different parties. A Joint Appendix is used and all appendix references will be to this Joint Appendix.

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**JURISDICTIONAL STATEMENT OF
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Appellants GJESSING, *et al.* appeal to this Court from
a decision of the United States Court of Appeals for the
Third Circuit holding that an act of the Legislature of
the Virgin Islands repealing certain prior acts of the
Legislature violated the Contract Clause of the United

States Constitution, Article I, Section 10, as applied to the United States Virgin Islands by Section 3 of the Revised Organic Act of 1954.

OPINIONS BELOW

The opinion and order of the United States District Court of the Virgin Islands holding Act No. 5188 of the Legislature of the Virgin Islands unconstitutional and granting a preliminary injunction is reported at 643 F. Supp. 869 (D.V.I. 1986). (App. 53a). The opinion of the United States Court of Appeals For The Third Circuit affirming the grant of the preliminary injunction is reported at 812 F.2d at 134 (3rd Cir. 1987). (App. 50a). The opinion and judgment of the United States District Court of the Virgin Islands entering a permanent injunction is reported at 658 F. Supp. 619 (D.V.I. 1987) (App. 41a). The opinion of the United States Court of Appeals For The Third Circuit affirming the judgment and grant of a permanent injunction by the District Court was entered on March 31, 1988, is reported at 844 F.2d 1007 (3rd Cir. 1988) and is reproduced in the Appendix at 6a. A certified judgment was issued in lieu of a formal mandate on May 26, 1988. No petition for rehearing or rehearing *en banc* was filed. That opinion of the Court of Appeals is now appealed to this Court for its review.

JURISDICTION

This appeal is brought under 28 U.S.C.A. § 1254(2) from an opinion and judgment rendered by the United States Court of Appeals For The Third Circuit on March 31, 1988.¹ A Notice of Appeal was timely filed in the court of appeals on April 21, 1988.

¹ *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed 2d 174 (1970) is distinguishable from the within appeal in that 28 U.S.C.A. § 1258 provides that this Court has jurisdiction over appeals of final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico. No statute specifically pro-

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal principally involves Article I, Section 10, of the United States Constitution which provides in relevant part that:

No State shall . . . pass any . . . Law impairing the obligation of Contracts . . .

as it applies to the territory of the United States Virgin Islands through Section 3 of the Revised Organic Act of 1954, 48 U.S.C.A. § 1561. (App. 185a).

The following statutes are also involved:

Section 8 of the Revised Organic Act of 1954, 48 U.S.C.A. § 1574 (a); the Territorial Submerged Lands Act of 1963 (Pub. L. 93-435, 77 Stat. 338, 1963), 48 U.S.C.A. § 1701; the Territorial Submerged Lands Act of 1974 (Pub. L. 93-435, 88 Stat. 1212, 1974), 48 U.S.C.A. § 1704; the Special Legislation provisions of 48 U.S.C.A. § 1471; the Virgin Islands Coastal Zone Management Act, 12 V.I.Code Ann. § 901 *et seq.*; and Act Nos. 3326, 4700, and 5188 of the Legislature of Virgin Islands.

All of the above-referenced statutory provisions are set forth in the Appendix. (App. 175a-179a, 185a *et seq.*).

STATEMENT OF THE CASE

1. Facts

This case rests squarely on the issue of the validity of a 1982 Settlement Agreement between the Government of the Virgin Islands, as successor in interest to the

viding for appellate jurisdiction regarding decisions invalidating territorial legislation exists. Therefore, should this Court strictly construe the language of 28 U.S.C.A. § 1254(2) to deny review of the Third Circuit Court's finding that a territorial statute is unconstitutional, Appellants will be denied equal access to the Supreme Court of the United States and will be precluded from exercising their due process right to seek review as a matter of right by the highest Court of the United States.

United States Government, and certain private parties, including the West Indian Company, Ltd., ("WICO") (App. 151a) in which the parties sought to conclude a quiet title action begun by the United States Government in 1968. (App. 85a). This Agreement was preceded by two agreements executed in 1973 and 1974, containing essentially identical terms. (App. 117a and 145a). (Collectively "Settlement Agreements"). The Legislature of the Virgin Islands authorized and ratified the 1973 and the 1982 Agreements in Act Nos. 3326 and 4700, respectively. (App. 176a-179a).

In 1986, the Legislature of the Virgin Islands, over Governor's veto, enacted Act 5188, ("the Repeal Act") which repealed Acts No. 3326 of 1972 and 4700 of 1982. (App. 175a). The two repealed Acts, *inter alia*, purported to ratify contracts purporting to grant WICO a commercial option, exercisable in perpetuity, to dredge and fill portions of the harbor of Charlotte Amalie, St. Thomas, U.S. Virgin Islands. The Acts also provided that WICO would own the resulting filled land in fee simple upon compliance with the conditions of the contract, and that WICO could develop the filled lands without conforming to the strict terms and procedures of the V.I. Coastal Zone Management Act ("CZM Act"), 12 V.I. Code Ann. § 901 *et seq.*, (App. 207a-247a) and most zoning regulations. WICO claimed these "rights" by virtue of a provision in the 1917 Convention of Cession by which Denmark ceded the Danish West Indies to the United States. In that provision, the United States agreed to "maintain . . . in accordance with the terms on which they are given . . . the concession granted to [WICO] . . . relative to a license to embank, drain, deepen and utilize certain areas in St. Thomas Harbor, and preferential rights as to commercial, industrial or shipping establishments in the said Harbor." (App. 101a).

The 1972 and 1982 Acts were by-products of a 1968 lawsuit brought by the United States to quiet title to

parcels of land claimed by both WICO and the United States under the 1917 treaty between Denmark and the United States. The United States also sought to declare terminated any license WICO may have had pursuant to the treaty to dredge and fill in the St. Thomas Harbor. (App. 85a-89a).

Notwithstanding the fact that the Government of the Virgin Islands was never joined as a party to the legal action, WICO, unsure of its legal position regarding the United States' challenges, made a settlement proposal to the Virgin Islands to alter the terms of the treaty. As a result of certain coercive acts by the trial judge and WICO (App. 90a-92a, 120a), the Virgin Islands Legislature enacted Act No. 3326, approved October 30, 1972, authorizing settlement of the claims on the terms set forth in a Memorandum of Understanding submitted by WICO. (App. 178a). A year later, on October 3, 1973, a formal Memorandum of Understanding was entered into among the United States Department of Interior, the Government of the Virgin Islands, WICO, and others. The Department of Interior, however, never executed the Agreement. (App. 142a). Because certain crucial issues were involved that were not necessarily within the direct scope of the lawsuit, the Justice Department included in the Memorandum of Understanding a provision that any conveyance had to be made pursuant to the then extant Territorial Submerged Lands Act of 1963, 48 U.S.C.A. § 1701 *et seq.* (App. 121a-122a). In 1974 Congress amended the Submerged Lands Act, 48 U.S.C.A. § 1705(a), conveying, subject to valid existing rights, title to all submerged lands to the Government of the Virgin Islands "to be administered in trust for the benefit of the people thereof." (App. 193a).

Thereupon, WICO immediately prepared a First Addendum to the Memorandum of Understanding essentially substituting the Government of the Virgin Islands for the Department of Interior and maintaining a conveyance

procedure based on the provisions of the amended Territorial Submerged Lands Act. This First Addendum was executed on October 28, 1975. (App. 145a).

In 1977, the Virgin Islands Legislature enacted the CZM Act, 12 V.I.C. Ann. § 901 *et seq.* to provide for the proper management of the coastal areas and to carry out its newly acquired trust responsibilities over the submerged lands of the Virgin Islands. (App. 207a).

WICO interpreted the CZM Act to preclude private ownership of submerged and filled lands and to restrictively control development within the coastal zone. WICO, therefore, immediately protested the applicability of the CZM Act to it and asserted that application of the CZM Act to WICO would constitute a breach of the Settlement Agreements. WICO submitted a draft complaint to the Government of the Virgin Islands, threatening to sue for breach of contract for five million dollars in damages. (App. 198a-201a). Thereafter, WICO submitted a proposal to the Virgin Islands Government to amend the CZM Act to exempt the area WICO claimed from the regulations imposed by the legislation.

In 1982, without any consideration of its obligation as trustee of submerged lands, the Virgin Islands Legislature, by Act No. 4700, ratified a Second Addendum to the October 3, 1973 Memorandum of Understanding. Act No. 4700 exempted WICO from provisions of the CZM Act regulating its dredge and fill activities and purported to ratify a contract that purported to create a contingent future interest in fee simple absolute which would vest, if ever, only upon WICO's exercise of a perpetual option.

The original 1968 lawsuit remained pending pursuant to a *sine die* Order until 1984 (App. 93a), when the trial judge in the instant case dismissed the action along with a number of old cases, *sua sponte*, as a ministerial matter.

In June 1986, after obtaining CZM and Army Corps of Engineer permits without following standard statutory

procedures, WICO commenced dredging in the harbor of Charlotte Amalie. This produced a public outcry, which resulted in the calling of a Special Session of the Virgin Islands Legislature on July 9, 1986 and the passage of Bill No. 16-0607, repealing Acts No. 3326 and 4700, and thereby the ratifications and approval of the Settlement Agreements. Although the then Governor vetoed the Repeal Act, on August 11, 1986, the Legislature overrode the veto and the Repeal Act became law as Act No. 5188. (App. 175a).

Pursuant to the Repeal Act, the Virgin Islands Department of Conservation and Cultural Affairs issued a stop work order against WICO's continued dredging. (App. 205a).

2. Proceedings Below

Upon being served with the stop work order, WICO promptly brought suit in the United States District Court of the Virgin Islands for immediate and permanent injunctive relief against the Government of the Virgin Islands. At the hearing on WICO's Motion for a Temporary Restraining Order, the Attorney General specially appeared and was allowed to withdraw on the grounds that his office represented the Executive Branch which had vetoed the legislation and which did not intend to defend the action. WICO's motion was then granted.

Motions to intervene were subsequently filed by the present appellants (hereinafter "Citizens") and the Legislature of the Virgin Islands which were granted by the Court. The Citizens argued, *inter alia*, that WICO had no vested property rights as any interest which it obtained had always been subject both to the public trust doctrine and to the Virgin Islands Government's exercise of its police power.

A Memorandum Opinion and Order granting WICO's motion for a preliminary injunction was entered on September 3, 1986. (App. 53a). The trial court held, first,

that the conveyance of trust lands was proper, and second, that the conveyance was not an impermissible abridgement of the government's police powers. The Citizens and the Legislature appealed this opinion and order to the United States Court of Appeals for the Third Circuit.

In their brief and argument to the Court of Appeals, the Citizens renewed the arguments based on the public trust doctrine and the continuing power of the Virgin Islands Government to exercise its police power. They also asserted that the conveyance was void as fatally violative of the Rule Against Perpetuities. The Court of Appeals, *per curiam*, on February 26, 1987, affirmed the District Court Order granting the preliminary injunction. (App. 50a).

On April 13, 1987, after receiving cross motions for summary judgment, the District Court granted judgment to WICO and entered a permanent injunction. In so doing, the Court adopted the rationale of its previous opinion and, with respect to the argument regarding the Rule against Perpetuities, held that Acts 3326 and 4700 were local laws which modified the Rule and therefore rendered it inapplicable.

Timely appeals of the District Court's order were filed with the United States Court of Appeals for the Third Circuit by the Citizens and the Legislature. At oral argument (App. 94a-97a), the Citizens, in addition to the arguments asserted previously, raised the point that Acts 3326 and 4700 were void as being *ultra vires* acts. It was argued that the Acts attempted to impair rights existing by virtue of a treaty entered into by the United States, and therefore violated section 8(a) of the Revised Organic Act of 1954, 48 U.S.C.A. § 1574(a). (App. 187a).

The Court of Appeals affirmed the decision of the District Court on March 31, 1988. (App. 6a). On April 21, 1988, the Citizens filed a timely Notice of Appeal

from this decision to the Supreme Court of the United States. (App. 1a). Related to this appeal is an appeal by the Legislature of the Virgin Islands from the United States Court of Appeals for the Third Circuit, App. No. 87-3369. Timely Notice of Appeal was filed by the Legislature with the Court of Appeals on June 13, 1988. (App. 4a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court of Appeals' finding that a valid contract was entered into between the Government of the Virgin Islands and the West Indian Company, Ltd. (WICO) is based on the erroneous application of Supreme Court decisions and statutory provisions to the facts of this case. The Court of Appeals' finding ratifies the extinguishment of traditional uses of the shoreline at Long Bay which are protected by a public trust and sanctions further destruction of the natural shoreline of the Harbor for as yet undisclosed uses by WICO. To prohibit the Virgin Islands Legislature from exercising its fiduciary duty to protect the submerged lands entrusted to it by repealing invalid acts of prior legislatures, strips the Legislature of its sovereign power to regulate the coastal zone in the interest of the citizens of the Territory and denies the people of the Virgin Islands the protection of the exercise of the police powers of the Legislature.

In addition, the 1982 Second Addendum and its predecessor agreements were invalid in that they altered the terms of the 1917 Treaty of Cession between the United States and Denmark in violation of Section 8 of the Organic Act of the Virgin Islands. Finally, the Settlement Agreements violated the Rule Against Perpetuities and therefore were void *ab initio*.

The potential impact of the decision rendered by the Court of Appeals reaches far beyond the facts of this case. The very status of the Virgin Islands Legislature *vis-a-vis* state legislative bodies has been thrown into question. Certainly, the powers of the territorial legislature, in matters relating to lands specifically placed under

its sovereign jurisdiction in trust for the people of the territory must include the power to subject all such lands to regulations designed to preserve and protect those traditional and beneficial uses for which the public trust doctrine was created. Such power cannot be contracted away, and the attempt by the Virgin Islands Government to do so was invalid. Hence, the question presented touches not only the technical and substantive invalidity of the agreements at issue, it goes directly to the integrity of Virgin Islands legislative enactments and the ability of the citizens to ensure that their inalienable rights cannot be irrevocably squandered by the imprudent action of a government of the day.

I. Established Principles of Public Trust Doctrine Compel a Finding that Attempts to Convey Submerged Lands for Undisclosed Development Purposes Are Invalid.

The submerged lands constituting St. Thomas Harbor are held by the Virgin Islands Government in trust for the people of the Territory, the government, having obtained title from the previous trustee, the Government of the United States.² Hence, in addition to the bare legal title to the property (the *jus privatum*), the public holds an equitable interest (the *jus publicum*) which may be extinguished only in highly exceptional circumstances. *Shively v. Bowlby*, 152 U.S. 1 (1894).

The conditions which must be met prior to any conveyance of property subject to the public trust restrictions have been clearly set forth in *Illinois Central Railway Co. v. Illinois*, 146 U.S. 387 (1893). In that case, the Court set forth the following test:

[t]he trust with which they are held, therefore, is governmental and cannot be alienated, except in

² Pursuant to the 1974 Territorial Submerged Lands Act, 48 U.S.C.A. §§ 1704-1708 (1982 & 1987 Supp.) the United States transferred title to the submerged lands in question to the Virgin Islands government "to be administered in trust for the benefit of the people thereof." 48 U.S.C.A. § 1705(a). (App. 193a)

those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and water remaining.

142 U.S. at 455-56.

Further analysis of the *Illinois Central* case reveals that both parts of the test must be met. Therefore, any agreement to convey property subject to the public trust must comply in substance with the strictures of the trust requirements or be declared invalid.

The lands in question are part of the floor of St. Thomas' principal port and, as such, part of the submerged lands conveyed by the United States to the Virgin Islands government. This fact was acknowledged by WICO when it agreed to follow the conveyancing procedure established in the Submerged Lands Acts of 1963 and 1974. (App. 122a and 145a).

The Court of Appeals findings that the alienation of the property in this case was prudent, in the public interest, and in keeping with the prior decisions of this Court constitutes a clear misapplication of precedent (App. 33a-35a). The focus in a public trust analysis must be a case specific determination of the public uses and interest potentially impacted by conveyance of the trust lands in light of the requirements of *Illinois Central*. The within case presents the Court with an opportunity to reinforce this analysis. The focus, by the Court of Appeals, on the fact that other submerged lands have been conveyed out of trust and that such conveyances have been upheld, does nothing to aid the inquiry necessary in the St. Thomas case.

The Virgin Islands Legislature breached the public trust when it amended Title 12, Virgin Islands Code, Chapter 21, pertaining to coastal zone management by Act No. 4700, approved April 7, 1982. (App. 176a). The amendment did not meet either of the criteria set forth in *Illinois Central*: (1) no finding was or could be

made by the Legislature that the proposed development would improve the public's interest in the *jus publicum* as the developer's plans have not been disclosed; and (2) in view of this unwillingness to disclose development intentions it was not determinable if the purported extinguishment of the *jus publicum* could be achieved without substantial impairment of the public's interest in the remaining trust lands and waters. The proposed uses of the reclaimed lands surmised by the Court (App. 34a) do not address the traditional public uses of the property and the cultural and aesthetic importance of preserving the remaining shoreline of St. Thomas Harbor. Appellants believe that without the analysis required by *Illinois Central* all of the Settlement Agreements must fail.

In its most recent statement on the public trust doctrine, this Court gave the trustee-state great deference in determining what constituted protected public trust interests. *Phillips Petroleum Co. v. Mississippi*, — U.S. —, 108 S.Ct. 791 (1988). The Court noted that uses well beyond navigation constitute valid public trust purposes. 108 S.Ct. at 798. Of particular application here, the Court stated “[t]he fact that petitioners have long been record title holders, or long paid taxes on these lands does not change the outcome.” 108 S.Ct. at 799. Just as the claim of Mississippi to the tidewater lands was upheld, so too, should the Virgin Islands Legislature be given deference when it specifically considered the public trust doctrine to determine and establish its “own views of justice and policy” concerning public trust lands in the territory. 108 S.Ct. at 799.

II. By Expressly Exempting WICO From the Operation of the CZM Act, the 1982 Agreement is Void as an Unlawful Attempt to Contract Away the Future Exercise of the Police Power.

The 1982 Second Addendum expressly exempts WICO from the provisions of the 1978 Virgin Islands CZM Act set forth in Title 12 V.I.C. Ann. Chapter 21. (App. 164a).

The CZM Act has been held to be a constitutionally valid exercise of the Virgin Islands Government's police power. *Great Cruz Bay Dev. Co. v. V.I. Board of Land Use Appeals*, 18 V.I. 536, 541 (D.C.V.I. 1981).

The well-established legal principle that the government's future exercise of its police powers cannot be contracted away was virtually ignored by the Court of Appeals and the District Court. In the seminal case of *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977), this Court noted the governing principle at page 23:

As early as *Fletcher v. Peck*, the Court considered the argument that 'one legislature cannot abridge the powers of a succeeding legislature'. 6 Cranch at 135. It is often stated that 'the legislature cannot bargain away the police power of a state'. *Stone v. Mississippi*, 101 U.S. 814, 817, 25 L.Ed. 1079 (1880) . . . In short, the contract clause does not require a state to adhere to a contract that surrenders an essential attribute of sovereignty.

431 U.S. at 23.

The application of this controlling principle to the 1982 Second Addendum voids the purported contract as an attempt to bind future Virgin Islands Legislatures from exercising their power to legislate for the public's interest.

The application is particularly compelling in view of the significance of the resources at issue and the highly regulated subject area to which the police powers apply in the instant action. WICO's dredging, filling, and development activities in St. Thomas Harbor are clearly within the coastal zone to which the Virgin Islands Legislature sought to give special protection in passing the CZM Act in 1978. Title 12 V.I. Code Ann. Chapter 21. (App. 207a). In particular, the Legislature recognized a pressing need to protect, conserve and, where possible, enhance resources found in the coastal zone for the benefit of the people of the Virgin Islands. Title 12 V.I.C. Ann. § 903. (App. 212a). This policy is consistent

with the national policy for the costal areas of the United States. Title 16 U.S.C.A. § 1451 *et seq.* To exempt WICO from the CZM Act and, thus, the continuing exercise of the Legislature's power to regulate development in one of the most important and fragile resources of the Territory, the coastal zone, is clearly contrary to the interests of the people of the Virgin Islands and an egregious breach of the powers of future Legislatures.

The breach is even more serious when considered in light of the prohibitions of the Rule Against Perpetuities, discussed below.

The Second Addendum is an invalid and unenforceable contract which expressly precludes the Virgin Islands Legislature from exercising its police power. The repeal of Act 4700, the legislative enactment ratifying the 1982 Second Addendum, was a valid renunciation by the 16th Legislature of an unenforceable contract.

III. The Settlement Agreements Entered Into Between WICO and the Virgin Islands Government Undeniably Constituted a Modification of the 1917 Treaty Between the United States and Denmark in Violation of Law; Accordingly, No Violation of the Contract Clause Occurred When the Legislature Enacted Act No. 5188 Repealing the Invalid Settlement Agreements.

Conspicuously absent from the Court of Appeals' conclusion that the 1982 Agreement was a binding contract and that the Repeal Act was a violation of the contract clause, as applied to the Virgin Islands, is any analysis of the validity of the Settlements Agreements in light of the prohibition set forth in Section 8(a) of the Revised Organic Act of 1954, 48 U.S.C.A. § 1574(a). (App. 187a). This provision unequivocally prohibits the Legislature of the Virgin Islands from enacting any law which would impair or alter any rights existing or arising by virtue of any treaty or international agreement entered into by the United States.

The 1973 Memorandum of Understanding plainly makes reference to the rights claimed by WICO under the 1917 Treaty and the desire of the parties to adjust those rights. (App. 117a, 119a, 122a). At no time did the United States or Denmark sign the 1973 or 1982 agreements. (App. 142a and 173a). In fact, the 1982 addendum was entered into solely between the Virgin Islands Government and the private parties. When the Legislature enacted Act No. 4700 in 1982 it was seeking to ratify the 1982 agreement.

From the scenario of events surrounding the making, approving, and executing of the various agreements, it is obvious that the Virgin Islands Legislature engaged in *ultra vires* activities by entering into settlement agreements and enacting laws which purported to modify and impair the terms of an international treaty of which the United States was a contracting party. Notably, neither Denmark nor the United States³ consented to any modification of the treaty as required by Sections 155 and 156 of Restatement (Second) Foreign Relations Law of the United States (1965).⁴ (App. 251a). Comment (c) to § 156 states:

Consent of all parties essential. The consent must be the consent of all parties if the agreement is to be validly modified, suspended or terminated with respect to all parties.

Id.

The Virgin Islands Legislature lacked any authority to enact laws or enter into agreements to alter or impair any international treaty where the United States was

³ Because the 1917 Convention of Cession constituted an international agreement, modification could only be accomplished by the joint action of the President and the Senate, Restatement (Second) Foreign Relations Law of the United States (1965) § 163(2), which was not done. (App. 253a).

⁴ In the absence of local laws to the contrary, American Law Institute restatements of the law apply as rules of decision for Virgin Islands Courts. Title 1 V.I. Code § 4. (App. 249a).

a contracting party. Further, the Settlement Agreements, modifying the international treaty failed to reflect the consent of all the parties to the Concession. Therefore the Repeal Act cancelling the Virgin Islands Governments' execution of the Settlement Agreements, could not have been in violation of the Contract Clause of the United States Constitution. If the agreements were not valid there could be no violation of contract rights.

IV. Valid Contract Rights Protected Under the Contract Clause Never Existed as the Application of the Rule Against Perpetuities to the Terms of the Agreements in Question Renders Such Agreements as Void *Ab Initio*, Especially in Such Circumstances Where the Public Trust Doctrine is Applicable.

The Second Addendum and its predecessor contracts all violate the Rule Against Perpetuities ("the Rule") and, therefore, are void *ab initio*. Restatement of Property (1944) §§ 370, 374, 393, applicable under Title I V.I. Code Ann. Section 4. (App. 250a and 249a). When a contingent interest in land is created, such contingent interest must be certain to vest or fail within twenty-one (21) years of its creation when viewed from the date of such creation. *Id.* The future interests purportedly created in WICO are springing executory interests that cannot vest in interest until they vest in possession, Leach, "Perpetuities in a Nutshell," 51 *Harvard Law Review* 638, 648 (1938) and are interests in land subject to the Rule. *Certified Corp. v. GTE Products Corporation*, 392 Mass. 821, 467 N.E.2d 1336 (Mass. 1984).

Though the assertions raised by the Citizens as applied to the Settlement Agreements (App. 28a), were conspicuously ignored by the Court of Appeals, it is imperative that courts of the United States apply the Rule where it is not altered, amended or terminated by law.

It is a well-established principle of statutory construction established by this Court that "the common law . . .

ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Housing Authority v. C. & P. Telephone*, 464 U.S. 30, 36 (1983). Contrary to the holding of the District Court (App. 46a), no provision of Act No. 4700 expressly or impliedly refers to a modification or repeal of the common law Rule Against Perpetuities or utilizes the common phrase, "notwithstanding other provisions of law".

To construe the statute as exempting WICO from the generally applicable Rule Against Perpetuities would have constituted "special legislation" prohibited by Title 48 U.S.C.A. § 1471 in effect at the time of enactment of Act No. 4700.⁵ (App. 248a). In fact, the same assertion may be made about the attempt of Act No. 4700 to exempt WICO from the CZM Act. To read the ratification language of "with the full force and effect of law," as repealing the application of the Rule is contrary to the well-established principle cited above. The common law rule is, therefore, fully applicable to the agreements in question.

Section 6(e) of the Second Addendum contains this provision: "The right on WICO's part to reclaim Areas IV, A-2 and VII-A is a right on WICO's part to perform the reclaiming and does not impose an obligation on WICO's part to be performed." (App. 157a). This provision purports to create a commercial option, exercisable in perpetuity, which causes WICO's future interests to be void *ab initio*. Restatement of Property (1944) § 393 (App. 250a); *United Virginia Bank v. Union Oil Co. of California*, 214 Va. 48, 197 S.E.2d 174 (Va. 1973); *Buffalo Seminary v. McCarthy*, 86 A.D.2d 435, 451 N.Y.S. 2d 457 (N.Y. App. Div. 1980), *aff'd*, 58 N.Y.2d 867, 447 N.E.2d 76 (N.Y. 1983); *Certified Corp v. GTE Products*

⁵ Title 48 U.S.C.A. § 1471 was subsequently repealed by Public Law 98-0312, § 16(w) to (ee) on December 8, 1983.

Corporation, 392 Mass. 821, 467 N.E.2d 1336 (Mass. 1984). The condition precedent to the vesting of WICO's future interest is WICO's outstanding decision to exercise the option, a decision that was not certain to occur, if at all, within 21 years of the date of the contract. The invalidity of WICO's future interests causes the entire settlement agreement to be unenforceable. Restatement of Property (1944) § 402(c). (App. 251a).

The appellate court's statement that "[t]he Second Addendum contains time limits within which WICO bound itself to act" (App. 26a-27a) is in error if the court assumed that these time limits assured that WICO's interests would be certain to vest or fail within 21 years. The Settlement Agreements do not contain a perpetuities savings clause, and all the time limits begin running from events that are not certain to occur, if at all, within 21 years.

The Rule Against Perpetuities should be applied especially in testing the validity of contracts that purport to extinguish the public's beneficial interests protected by the public trust doctrine. The sovereign, as trustee, cannot extinguish the *jus publicum* unless particular requirements have been met. See: *Illinois Central Railway Co. v. Illinois*, *supra* 146 U.S. at 452-53. If the sovereign purports to license extinguishment of the *jus publicum* on a remote contingency—one that is not certain to occur, if ever, within 21 years—there is no way that the sovereign can be certain at the outset of such an attempt that the *Illinois Central* criteria have been met, or will ever be met. The provisions of the Settlement Agreements that purport to license a remote extinguishment of the *jus publicum*, therefore, violate the public trust doctrine. By purporting to exempt the remotely vesting interests from applicable comprehensive laws, these provisions also constitute an egregious effort to contract away, in perpetuity, the future exercise of the police power.

The Settlement Agreements would "put it in the power of the company [WICO] *to delay indefinitely* the improvement of the harbor. . . ." (emphasis added) *Illinois Central* at 451. The Supreme Court, in *Illinois Central*, would not uphold such a perpetual power; appellants respectfully argue that WICO's purported perpetual power is similarly invalid.

These principles apply equally to the Virgin Islands Government's action and to the prior attempts of the U.S. Government, as both acted as trustees of the submerged lands in question and parties to the Agreements. *Martin v. Waddell*, 41 U.S. 367 (1842); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894); Act of November 20, 1963, Pub.L. 88-183, 1963, U.S. Code Cong. & Ad. News (77 Stat.) 366 (App. 188a); and 48 U.S.C. § 1705(a) (Supp. 1988), Pub.L. 93-435, 93d Cong., 2d Sess.

CONCLUSION

It follows from the arguments set forth above that a substantial question exists whether a valid contract existed under established Supreme Court precedent and applicable constitutional and statutory provisions. If the 1982 Settlement Agreement was an invalid contract the Repeal Act could not constitute a violation of the Contract Clause of the United States Constitution as applied to the United States Virgin Islands and the holding of the Court of Appeals must be reversed. Appellants pray this Court to accept this case for appellate review.

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